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NO. 73-1018

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Petitioner

v.

MARTIN DEWALT MAZURIE, et al.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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MARTIN DEWALT MAZURIE, Et Al,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. (a) Did the United States fail to meet its burden of proof establishing the jurisdictional element of an "Indian community" as applied to the Respondents in the context of 18 U.S.C. 1154:

(b) Whether or not the terminology "Non-Indian community", as a jurisdictional element of this criminal prosecution alleged under the provisions of 18 U.S.C. 1154, is incapable of a sufficiently precise definition to define the boundaries of criminal responsibility and accordingly unconstitutionally indefinite and vague.

2. (a) If the Act of Congress, August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161 and the subsequent action of the Wind River Tribes in 1953 acting pursuant thereto operated to terminate federal pre-emptive controls of liquor on the Wind River Indian Reservation vesting same in the State of Wyoming; and

(b) If the tribal government has the power to terminate relinquished jurisdiction over liquor transactions from the State of Wyoming as pertains to non-Indian citizens of the state owning fee-patented land.

3. (a) If Congress has the authority to delegate regulatory powers over intoxicating liquors, with penal sanctions, to tribal councils so as to allow said councils to govern non-Indian fee-patented landowners, who are not allowed to vote or be represented thereon, who are without the safeguards of the Federal Administrative Procedures Act, who are without recourse to the courts for grievances, and who are required to pay fees not required of Indian licensees thereunder; and

(b) If the issuance of a patent, without restriction or encumbrances, operates to extinguish Indian jurisdiction over the lands vesting same in the State of Wyoming.

STATUTES INVOLVED

18 U.S.C. 1151 providing:

> Except as otherwise provided in Sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation***.

18 U.S.C. 1154 providing:

> (a)*** Whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years or both.
>
> * * * * * * * *
>
> (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian Reservations, and this section does not apply to such lands or rights-of-way in absence of a treaty or statute extending the Indian liquor laws thereto.

18 U.S.C. 1161 providing:

> The provisions of Sections 1154, 1156, 3113, 3488, and 3618, of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

STATEMENT

1. By treaty of July 3, 1868, the Wind River Indian Reservation was established in West Central Wyoming, reaching at that time an area of approximately three million acres. The lands were occupied by the Arapahoe and Shoshone Tribes, hereinafter referred to as the Wind River Tribes. Through various agreements over the years, the size of the reservation was diminished and over fifty

per cent of the original reservation was ceded to the United States. Thereafter, as a result of the various Indian Allotment Statutes, approximately twenty-two per cent of the remaining land area in the Wind River Reservation was deeded to non-Indian owners and patents issued thereon. Although these patented lands are within the original exterior boundaries of the Wind River Indian Reservation, the non-Indian owners thereof in fee are not members of the Wind River Tribes, nor are they represented in the Joint Business Councils thereof, entitled to vote in the tribal government, nor do they have access to any court for grievances that may arise due to the acts of the tribal governments. Approximately five hundred non-Indian land owner citizens of the State of Wyoming are subjected to the regulations and ordinances governing them and the use of their fee-patented lands by the Wind River Tribes, without representation.

In 1953, federal legislation was introduced and enacted which removed the general prohibitions against the sale of liquor on Indian reservations.1 Acting in accordance with the newly enacted federal statutes allowing the sale of liquor, the Wind River Tribes, with the approval of the Secretary of the Interior, began to permit the sale of alcoholic beverages on the Wind River Indian Reservation and transferred all regulation and control thereof to the State of Wyoming.

2. Shortly after the federal delegation of regulatory authority to the State of Wyoming, the Respondents' predecessor in title obtained a patent from the United States to certain lands located within the exterior boundaries of the Wind River Indian Reservation. The patent was unrestricted as to the use of the lands in question.2 In 1954, the Respondents' predecessor in title obtained a Wyoming liquor license as issued by the Fremont County Commissioners of the State of Wyoming and began operating a retail liquor trade on the deeded land. (Pet. App. C., P. 33)

[1]Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161

[2]A.65 A. refers to the Single Appendix filed herein; R refers to the one-volume Record on Appeal.

3. Approximately eighteen years later, the Joint Business Council of the Wind River Tribes unilaterally attempted by enactment of Ordinance No. 26, to extinguish the previously delegated regulatory functions to the State of Wyoming. This new ordinance carried with it a general prohibition of the sale of liquor on the Wind River Indian Reservation unless an applicant, be he Indian or non-Indian, obtained a license from the Tribal government as well as one from the State of Wyoming. (Pet. App. A., P. 19; see also Stipulation, 8) The ordinance carried with it no administrative rules and regulations for the conduct of hearings on licenses, specified different fee structures for Indian vis a vis non-Indian applicants, and provided no procedural safeguards, including access to the courts, for non-Indian applicants.

4. The Blue Bull Bar, Inc., is a Wyoming corporation and is owned by the Respondents, Margaret Mazurie and her husband, Martin Mazurie, A. 8 through 10, 65; Pet. App. C., P. 33) Since 1969, the Mazuries operated the Blue Bull Bar on the deeded land owned by the corporation under the valid regulatory provisions of the laws of the State of Wyoming.

5. In April of 1972, after the enactment of Tribal Ordinance No. 26, federal Indian officers notified the officers and directors of the state corporation that they would be subjected to criminal prosecution regardless of the fact that they had a valid State liquor license and were operating on deeded lands under the jurisdiction and control of the State of Wyoming. In an attempt to obtain a tribal permit, the Respondents applied for a Tribal liquor license and were denied same. No procedures were available to the non-Indian applicant to make any appeal from the administrative determination of the tribal hearing nor was counsel for the Respondents, who appeared at the hearing, allowed to make a transcript or effect cross-examination. Since no transcript of the so-called "public hearing" was made, the record is, at best, sketchy as to what transpired. After denial of the Tribal liquor license, the Respondents, with no recourse to the Court for a review

of the proceedings, again opened the Blue Bull Bar and operated same under the provisions of their still valid and unquestioned State liquor license. Shortly thereafter, on June 13, 1973, federal officers seized and confiscated the alcoholic beverages and charged the Respondents with a criminal offense of introducing alcoholic beverages into Indian country in violation of 18 U.S.C. 1154, notwithstanding the existence of the valid State license. (Pet. App.C., P. 33; A71; , i)

6. Trial was held in the District Court without a jury. Ownership and management of the bar, the issuance of the patented fee without restriction, the terms and provisions of Tribal Ordinance No. 26, and the application for and denial of a Tribal license were stipulated by the parties. It was further stipulated that the Respondents were operating under a valid and current retail liquor license issued by the County Commissioners of the State of Wyoming, which had been issued each year by the State from 1954 through the present.

7. The evidence at trial demonstrated that:

(a) The Blue Bull Bar is located on fee-patented lands comprising a ten acre tract, same located approximately three-quarters of a mile from the nearest town of Fort Washakie, Wyoming. (A. 65, 31-32) Fort Washakie is an unincorporated town at which is the location of the headquarters of the Wind River Agency of the Bureau of Indian Affairs. At Fort Washakie, housing is provided for both Indian and non-Indian employees of the Wind River Tribes and the United States Government. (A.25, 69-70) The schools in the Fort Washakie area are organized as a regularly functioning school district of the State of Wyoming. (A. 21, 76)

(b) Housing surveys in the Fort Washakie area indicate that 41 of 170 families living in the area are non-Indian. (A.P.28) Of eleven business establishments operating within the town, eight are owned by non-Indians. (A. 31)

(c) One-fourth of the land in the Fort Washakie area is now fee-patented and under the jurisdiction of the State of Wyoming, (P.41)

(d) The State law enforcement officers have jurisdiction and authority to enforce criminal laws as to non-Indians on the Wind River Indian Reservation. (A.36) Non-Indians cannot be arrested under any ordinances enacted by the Tribal Council and the Superintendent of the Wind River Indian Reservation has no federal authority over deeded lands. (A.37-38, 42, 45, 55, 58, 61, 63, 76)

(e) All roads in the Fort Washakie area are controlled and maintained by the State of Wyoming. (A.40, 76) The State of Wyoming exercises tax authority over the patented lands located within the Fort Washakie area. (A.77, 19-24, 44)

(f) No boundaries can be drawn as to the Fort Washakie community. (A.38) There is no way to determine the boundaries of this community and no city, corporate, or governmental limits exist to define these boundaries. (A.39)

(g) There are no boundaries that can be defined as to the Indian community in the Fort Washakie area. (A.39, 49, 53, 58)

(h) There is no way that a boundary or a definition of an Indian community can be determined on the Wind River Indian Reservation. (A.39, 49, 50, Defendants' Exhibit "H", extracted P. 50, 53, 58)

(i) The State has assumed jurisdiction over non-Indians on deeded lands located within the exterior boundaries of the Wind River Indian Reservation, including private business regulation. (A. 38, 42, 45, 50, and Defense Exhibit "H", A-55, 58, 61, 63)

(j) The Respondents were acting in complete compliance with the laws of the State of Wyoming regulating the private business of a non-Indian corporation located on deeded land. (A.65, 77)

8. The equivalent "chiefs" of the respective tribes, now designated chairmen of the Joint Business Council, testified that they had lived on the Wind River Indian Reservation all of their lives and that there could be no boundaries defined where an "Indian community" begins or ends. Further testimony of the chiefs of the respective tribes indicates that they would say that it was Indian country only and that no boundaries can be drawn around an Indian community. In response to the counsel for the government's question concerning the terms "Indian country" and "Indian community", the response on record is "I would say it is not a community in the sense of a white community or anything else. This is related as Indian country, no boundaries." (A 53) Pertaining to the question of relinquished jurisdiction, general counsel for the Arapahoe Tribe, Mr. Wilkinson of Washington D. C., went on record stating "states normally do not exercise any jurisdiction within the exterior boundaries of an Indian Reservation without the express authority of Congress. States have jurisdiction over non-Indians within a reservation and where Congress has permitted land to enter fee status, the State has jurisdiction over the fee land." (A.50-51) (A.48-61)

9. On the basis of this record, the United States District Court for the District of Wyoming entered a finding that the Blue Bull was located in Indian country as defined in 18 U.S.C. 1151. The court did not, however, find that the Blue Bull Bar was located within an Indian community as required by statutes under which the Respondents were prosecuted, 18 U.S.C. 1154. An initial finding of the District Court indicated that the tribal ordinance requiring a tribal license had been violated and penal sanctions were applied to the non-Indian Defendants upon conviction.

10. On appeal, the matter was reversed and the conviction set aside. (487 F.2d 14)

11. The Court of Appeals held that the government had not met its burden of proof in this criminal prosecution by establishing beyond a reasonable doubt that the Respon-

dents were located within an "Indian community" as specifically required under the provisions of 18 U.S.C. 1154 (c), and went further to hold that the provisions of the statute, 18 U.S.C. 1154 (c) were vague and ambiguous in not providing for any definition of the term "non-Indian community". The Court of Appeals narrowed the issue as follows:

> "Thus, if it is assumed for the moment that the fee land in question is in 'Indian country' generally, the question whether the particular place was also in a 'non-Indian community' must be resolved if it can be. If the tavern was in a 'non-Indian community' in 'Indian country' no crime was committed. The statute does not refer to 'Indian communities' nor to 'non-communities' ".

12. The Court of Appeals found that the proof in the record of this element of the crime was inconclusive and indefinite.

13. The Court of Appeals further held that what constitutes a "community" for the purposes of the statute, 18 U.S.C. 1154(c) was not defined nor could it be clearly ascertained. That under these conditions, the business generally "could be either a federal crime or perfectly legal" and held that the statute was fatally defective by reason of the vagueness and indefiniteness of the terminology "non-Indian community".

14. The Court also addressed itself to the fundamental issue of whether or not the Indian tribes could regulate a non-Indian's business in such a way that "a failure to conform constituted a crime." The Court of Appeals expressed its concern over a governmental delegation to the tribes of an unrestricted power to determine whether or not the operation of a non-Indian's business constituted a federal crime or not and found that the reported delegation of authority to the Indian tribes in the context of its relationship with non-Indians on fee-patented lands who are unable to vote, be represented, or have access to the courts as provided by 18 U.S.C. 1161 was invalid.

15. In support of these contentions, the Court of Appeals suggested, by way of dicta, that Congress does not have the authority to regulate and control the sale of alcoholic beverages by non-Indian licensees of the State located on fee-patented land within the original external boundaries of an Indian reservation.

SUMMARY OF ARGUMENT

1. The Court of Appeals did not err in determining that the government failed in its burden of proof to establish that the Respondents' bar was located within an Indian community, which is a jurisdictional element of a prosecution under 18 U.S.C. 1154. The record is clear that there was no testimony establishing whatsoever that the tavern was in fact located within an Indian community as required by the terms of the statute. Further, the Court of Appeals was correct in holding that the terminology "non-Indian community" as found within the 18 U.S.C. 1154 is unconstitutionally indefinite and vague. The record amply demonstrates the difficulties that even the elders of the tribes had in defining what, if any, boundaries exist and what determines an Indian community. The statute, on its face, does not define the boundaries and, as such, is unconstitutionally void for vagueness under the guidelines prescribed by this Court. ***United States v. National Dairy Products Corp.***, 372 U.S. 29; ***Connally v. General Construction Co.***, 269 U.S. 385.

2. Although Article I, Section 8, of the Constitution authorizes Congress to regulate commerce "among several states and with the Indian tribes," this power may be relinquished to the states. The enactment of 18 U.S.C. 1161, August 15, 1953, terminated and delegated the federal control, sovereignty, and jurisdiction for the regulation of liquor trade on the Wind River Indian Reservation and vested same fully in the State of Wyoming. The subsequent enactment of a tribal ordinance some eighteen years after the termination of federal jurisdiction and regulatory control, did not and could not operate to terminate the jurisdiction then vested in the State of Wyoming as operative over non-Indians, citizens of the State of

Wyoming, living on deeded lands, who had been governed and regulated by the State of Wyoming for some eighteen years.

3. Although Congress has the power under Article I, Section 8, of the Constitution to regulate commerce among the sovereign states and with the Indian tribes, it does not have the constitutional authority to delegate regulatory powers with penal sanctions to tribal governments, allowing the tribal governments to enact ordinances with criminal penalties applicable to non-Indian fee-patented land owners who are not allowed to vote in the tribal council, who are not represented in the tribal council, who have none of the safeguards of the Federal Administrative Procedures Acts available to them, who have no recourse to the Courts for grievances from adverse decisions, and who are required to pay higher license fees than are required of Indian licensee applicants thereunder. In this regard, the issuance of a patent to a non-Indian operates to extinguish Indian title and jurisdiction over the lands in question as pertains to the control of liquor traffic, fully vesting this control and responsibility within the regulatory function and police power of the State of Wyoming where the constitutional safeguards of representation and due process are available to the citizens of Wyoming.

ARGUMENT

THE UNITED STATES FAILED TO MEET ITS BURDEN OF PROOF ESTABLISHING THAT THE GEOGRAPHICAL LOCATION OF THE RESPONDENTS' BAR WAS WITHIN AN "INDIAN COMMUNITY", WHICH IS A BASIC JURISDICTIONAL ELEMENT OF THIS CRIMINAL PROSECUTION UNDER 18 U.S.C. 1154.

The Court of Appeals held that:

> There are several inter-related conditions and definitions, referred to above, which must be established under the several sections of the statute for there to be a violation. For example, the place where the sale took place must be in

"Indian country," under 18 U.S.C. SS1154 and 1161, but not on "fee-patented" land in "non-Indian communities." Also, the sale must not be in "conformity" with the State laws and tribal regulations of the tribe "having jurisdiction" over the area of Indian country. 18 U.S.C. 1161. These definitions or requirements must be examined as a part of the crime charged . . . we are thus concerned with the elements of this crime . . . the geographical-land status terms and the substance and effect of tribal regulations thus becomes part of the elements of a crime, and, if not shown, the act was a legal one . . . the type of business engaged in by the Appellants is what has now become a regulated retail business which has been legalized by the United States and licensed under the laws of the State of Wyoming. Thus, the selling of liquor to Indians at a tavern licensed by the State is, of course, not a federal crime per se', but can become one under certain conditions, the definition of which, and the problem of proof of the existence of which, are hereinafter described . . . The proof in the record herein of this element of the crime is inconclusive and indefinite. It showed that the tavern was located from one-half to three-quarters of a mile from the Reservation's headquarters at Fort Washakie where there were located about eight business places. In the twenty square mile area surrounding the Agency, it was estimated that there were one hundred seventy Indian families. The witnesses called by the government were unable to identify any boundaries of Fort Washakie. Mr. Harris, Chairman of the Shoshone Business Council, testified that the place in issue was not an "Indian community" . . . All that the proof shows was that the location was probably not in

> an Indian community; however, the statute refers only to non-Indian communities. 487 F.2d 143 (Emphasis supplied)

Even a cursory examination of the record will verify what the Court of Appeals determined. The government could not carry its burden of proof and establish that the Blue Bull Bar was located within an Indian community. The government, in their brief, at page 13, admirably attempts to distinguish this failure of proof by the statement, "and if the Blue Bull is not in a 'community' at all for purposes of this exception, then it is equally clear that the exception is inapplicable and the general proscription governs." The fallacy of the government's position here is obvious; i.e., if the proof in the record cannot establish an Indian community at all, then the clear wording of the statute requiring this finding should be ignored and the general definition of Indian country as found in 18 U.S.C. 1151 should control.

On this question of statutory construction, the Court of Appeals reasoned that:

> The basic statute (18 U.S.C. 1154) originally made it a crime to sell liquor to certain Indians at any location or to introduce liquor into "Indian country". By subsection (c), it was then provided that "Indian country" as used in the section "*** does not include fee-patented lands in non-Indian communities.***" Thus if it is assumed for the moment that the fee land in question is in "Indian country," generally the question whether the particular place was also in a "non-Indian community" must be resolved if it can be. If the tavern was

[3]Contrary to the government's contention that the pertinent element of the crime in this prosecution was the term "Indian country" as found and defined in 18 U.S.C. 1151, the prosecution in this case was had under the provisions of 18 U.S.C. 1154(c) which requires, as the Court of Appeals held, that the government carry forth with proof of the fact beyond a reasonable doubt that the geographical site of the land in question was within an Indian community . . . Otherwise, the prosecution must fail as charged under the provisions of 18 U.S.C. 1154(c).

> in a "non-Indian community" in "Indian country," no crime was committed. The statute does not refer to "Indian communities" nor to non-communities. 487 F.2d 14 (Emphasis supplied)

18 U.S.C. 1154 was enacted in 1877 and the relevant provisions of the statute for the purposes of this appeal, subsection (c), was added in 1949. The 1949 Act of Congress more narrowly defined the term Indian country for the purposes of 18 U.S.C. 1154. The government's position on appeal is that the old definition of Indian country still prevails and controls prosecution subsequent to the effective date of the amendment. This is clearly contrary to the legislative intent of the Congress.[4]

Contrary to the position of the government in their brief, on page thirteen, to the effect that the District Court found that the Blue Bull Bar was not in such a community, the only finding in the record indicates that the District Court found that the Blue Bull Bar was located within "Indian country". No finding exists that the geographical situs of the bar was within "an Indian community". The government's brief and the position of the trial court was to place the burden of proof upon the Defendant to establish that in fact the bar was not located within an Indian community.

The government cites no case law for the proposition that if the proof of the existence of an Indian community does not exist and is not shown in the record, then this requirement, or element, of a criminal prosecution is

[4]Upon reading the provisions and definitions of "Indian Country" in 18 U.S.C. 1151 and then the more restrictive definition placed upon the term for the purposes of a criminal prosecution under the provisions of 18 U.S.C. 1154(c), it becomes quite clear that Congress intended to limit the applicability of the penal sanctions of Section 1154 to those areas which are Indian communities. The government's attempt to make this provision of the statute inapplicable to this criminal prosecution amply demonstrates the fallacy of that position. Should the general prescription of the definition of Indian country as found in 18 U.S.C. 1151 be the standard as argued by the government, then there would have been no need for the enactment of 18 U.S.C. 1154(c). The government's argument must fail in this regard and the record clearly establishes that the government could not sustain its burden of proof in establishing that the Blue Bull Bar was in fact located within an Indian community.

inapplicable and can be set aside. A reading of the applicable portion of the statute negates this proposition and demonstrates that this element must be proven and, in this case, was not.

18 U. S. C. 1154(c) reads as follows:

> The term "Indian country" as used in this section does not include fee patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands of rights-of-way in the absence of a treaty or statute extending the liquor laws thereto. (Emphasis supplied)

The criminal statutes are to be strictly construed. ***United States v. Enmons,*** 410 U.S. 396.

Obviously, the government and the trial court had no alternative but to attempt to shift the burden when the proof failed to establish the affirmative element. The Court of Appeals held:

> The statute was applied in the trial court, and here urged by the government, as containing a requirement, (being in a non-Indian community) to be demonstrated at trial by the Defendants. Placing such a burden on the Defendants was imporper. ***Gruenwald v. United States,*** 353 U.S. 391.

Accordingly, the government failed in its burden of proof at trial and must now fail on appeal.

THE TERMINOLOGY "NON-INDIAN COMMUNITY" AS FOUND IN 18 U.S.C. 1154 IS UNCONSTITUTIONALLY INDEFINITE AND VAGUE

Addressing itself directly to the problem of what is or is not an "Indian community", the Court of Appeals made the following analysis:

> "Thus, if it is assumed for the moment that the fee land in question is in 'Indian country,'

(as found by the District Court) generally, the question whether the particular place was also in a 'non-Indian community' must be resolved if it can be . . . The Reservation superintendent testified there were no community boundaries which could be defined . . . An examination of the record on this issue demonstrates that the inability of the witnesses to testify with specificity stems from the lack of any standards or any definition for the term . . . There is no standard provided as to what percentage of Indians or non-Indians is contemplated. Thus, if a given area can be selected as a 'community', the statute does not indicate that if there are more Indians than non-Indians, it becomes an Indian community, or what the 'community' is if there are a greater or lesser comparative number of Indians. The Act also does not state who is an Indian. There are acts for other purposes which use 25% Indian blood as a standard; others leave the test up to the tribe concerned. Thus, perhaps tribal membership is a test. However, if the 25% test is used, individuals who are 75% non-Indian could be counted to make up an "Indian community", but in any event, there is no guide as to this whatsoever.

It is also apparent that what constitutes a 'community' for this purpose is not defined nor can it be clearly ascertained. In an area where the defendants' bar was located, there were apparently some few scattered houses, although the record is not clear, but the witnesses did not have any standard on which to base their testimony. As mentioned, the nearby Fort Washakie had no definable boundaries, if it was a community, and the witnesses thus could not testify whether the bar was in it or not. There was thus no proof as to whether it

was in a community or not in one, or if in one, what kind. Again, the proof failed because the statute contains no reasonably ascertainably standards.

Under these indefinite and vague conditions, the business generally, or isolated transactions legal under state law, could be either a federal crime or perfectly legal. We must hold that the terminology of 'non-Indian community' is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar informities." 47 F.2d at 18

The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. ***United States v. Harriss,*** 347 U.S. 612, (1954); ***Bouie v. Columbia,*** 378 U.S. 347 (1964). The language of the statute must convey sufficiently definite warning as to the proscribed conduct when measured by the common understanding and practices of the local area. ***Roth v. United States,*** 354 U.S. 476, Reh Den 355 U.S. 852 (1957) The record clearly demonstrates the total lack of understanding and agreement within the Wind River Indian Reservation as to where boundaries of an Indian community lie. Not even the chiefs or elders of the tribes can draw that line and this line has not been able to be defined for over one hundred years. Coupled with this is the proposition that for over eighteen years the local practice has been that this business was perfectly legal under the laws and licensing provisions of the State of Wyoming and the same had become the local understanding and practice. The government's position on this point attempts to avoid the obvious effects of the statute by stating that after eighteen years of legality of operation under a license issued by the State and not revoked, a visit by federal officers and agents informing the Respondents that they were now in violation of some law does not correct the infirmity here.

This Court has held that the initial examination of the statute must necessarily be made "on its face" to determine whether or not specific and definable boundaries of criminal activity are prescribed. In determining the sufficiency of notice or warning contained in the statute the enactment must be examined in light of the conduct with which the defendant is charged. ***United States v. National Dairy Products Corp.,*** 372 U. S. 29. Under these standards. the wording of the statute must not require citizens to guess or speculate as to its meaning and must be standard enough so that persons of ordinary intelligence will not differ as to the application of the criminal prohibition. ***Connally v. General Construction Co.,*** 269 U. S. 385. After eighteen years of perfectly legal business activity, the Defendants are now charged with a crime. All of the preexisting licenses, valid as issued by the State, remain in force and effect. The crime charges them with doing business within an "Indian community" which for all the years prior to this time had been perfectly legal. No one can define where and what an Indian community is. The record itself demonstrates differences of opinion as to where the boundaries of criminal conduct lie here. The basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined. ***Grayned v. Rockford,*** 408 U. S. 104. This Court has directed, in earlier decisions, that criminal statutes are to be strictly construed and any ambiguities found therein must be resolved in favor of lenity. ***United States v. Enmons,*** 410 U.S. 396. No individual conviction can be upheld unless the statute prescribes a fair warning that is given to the world in language that the common world would understand if a certain line is passed. ***Mourning v. Family Publication Service, Inc.,*** 411 U.S. 356.

The trial court did not make a finding of whether or not the area in question was "an Indian community". The witnesses, including the elders of the tribes and the superintendent of the Reservation, could not define or state what was an Indian community on this Reservation and where the boundaries thereof might be located with respect to

Respondents' geographical situs. The Court of Appeals could not find sufficient certainty and definitiveness in the statute when considered independently and coupled with the record of the proceedings had herein. The Court of Appeals did not err in finding that the statute is fatally defective by reason of its indefinite and vague terminology.[5]

THE ACT OF CONGRESS OF AUGUST 15, 1953, 67 Stat. 586, 18 U.S.C. 1161, TERMINATED FEDERAL PREEMPTION OF THE REGULATION OF LIQUOR ON THE WIND RIVER INDIAN RESERVATION AND VESTED SAME FULLY IN THE STATE OF WYOMING AND THAT THE SUBSEQUENT ENACTMENT OF TRIBAL ORDINANCE No. 26 DID NOT OPERATE TO TERMINATE THE JURISDICTION RELINQUISHED AND VESTED IN THE STATE.

The Congressional Enactment of 1953 operated to end federal pre-emption of the regulation of intoxicating liquors with the Indian tribes. The operation of 18 U.S.C. 1161 automatically excludes the criminal sanctions of 18 U.S.C. 1154, under which provision this prosecution was taken, if the act or transaction in question was legal under the laws of the state and consistent with an ordinance adopted by the tribe having jurisdiction over such area of Indian country.[6] Prior to the enactment of this statute, the federal government had totally pre-empted this field and the original provisions of 18 U.S.C. 1154 completely precluded the sale of any type of alcoholic beverage to a reservation Indian or the introduction thereof into Indian country. The statutory scheme was changed in 1953 when it became recognized that sales of liquor and alcoholic beverages to

[5]The analysis of the State of Wyoming is pertinent here in the context of the warnings given by federal officers:

> "If a statute is unconstitutionally vague, a request to comply with it, coupled with a threat of prosecution, is not going to correct or legitimize the constitutional infirmities." Amicus Brief, State of Wyoming, Pg. 4

[6]The question of whether or not the geographical situs of the Blue Bull Bar, Inc., was in such an area of Indian country as to confer jurisdiction for legislative purposes upon a tribal council is discussed later in this brief.

Indians could be carried out if done pursuant to the regulatory scheme of the state in which the reservation was situated. Should a local tribe decide that they wished the sales of liquor to be made available to their people, a local ordinance could then be enacted authorizing same and adopting the regulatory functions of the state. The tribes in question in this litigation, in 1953, did so act and conferred regulatory jurisdiction upon the State of Wyoming for all purposes of government. The state assumed this function and the Respondents' predecessor in title operated this establishment fully licensed and regulated by the State of Wyoming since 1954.

The control and supervision of alcoholic beverages is traditionally a function of the police power reserved to the states. ***South Carolina v. United States,*** 199 U. S. 437; ***Wilkerson v. Rahrer,*** 140 U. S. 545; ***California v. LaRue,*** 409 U.S. 109. This regulatory function of the state is properly vested within the local county officials in the State of Wyoming and the statutes of Wyoming contain every possible safeguard for the welfare of not only the Indian but also his non-Indian neighbor on the reservation.[7] The public health and welfare responsibilities are in practice strictly enforced.[8]

[7]Reference is made here to the Amicus brief filed on behalf of the State of Wyoming as to the administrative and due process safeguards built into the Wyoming statute.

[8]Upon advertisement of the annual renewal of the Blue Bull Bar license, and provisions for protest thereof, published in the local newspaper, a number of people protested the issuance of a renewal permit and the state authorities denied same. Most of the protestants were Indian people who, as citizens of the State of Wyoming, have direct access to this regulatory function. The Respondents speculate that the factual questions raised herein are moot now inasmuch as the state regulatory function, at this time, has afforded and accommodated the government's purpose in this prosecution.

This absolute power of the states to prohibit and regulate traffic in intoxicating liquors within the quarters of said state is not limited by the commerce clause. ***California v. LaRue,*** 409 U.S. 109 This broad grant of power to the states with the regulation of intoxicating liquors is further enhanced in this instance by the express delegation of authority by the Congress in the enactment of 18 U.S.C. 1161, providing for the state regulatory function to become complete in dealings with the Indian tribes. The power became vested in the state and numerous citizens, Indian and non-Indian, acted in reliance thereon, and are regulated effectively by the State of Wyoming under the provisions of the local statutes.

By the enactment of Tribal Ordinance No. 26, it all of a sudden became a crime for a non-Indian to engage in behavior licensed under the state. A dual licensing burden was placed upon a non-Indian. Numerous questions are presented by the enactment of Tribal Ordinance No. 26. These problems will be discussed in sequence in the remaining pages of this argument.

Whether or not Tribal Ordinance No. 26 was an effective enactment depends upon very difficult constructions of basic constitutional issues such as whether or not Congress can delegate its power to an Indian tribe to regulate non-Indians affixing penal provisions. In this context, the Court of Appeals indicated "the question is whether additonal licensing was required." This raises the issue of whether or not the tribes have the authority to regulate a non-Indian's business in such way that "a failure to conform constitutes a crime." The business was legal under the laws of the State of Wyoming and had been so for the past eighteen years. The tribal authorities, acting unilaterally, then imposed a dual licensing requirement upon non-Indians, living on deeded land. The penalty for failure to conform was a criminal prosecution regardless of the still existing and valid state license.

Although the Court of Appeals' statements are dicta, which need not be reviewed by this Court, the basic policy rational considering the relationships of the parties herein,

is sound in principle. The question utltimately revolves around the definition of "legislative jurisdiction" as found within the specific provisions of 18 U.S.C. 1161.

CONGRESS DOES NOT HAVE THE AUTHORITY TO DELEGATE ITS GENERAL REGULATORY POWER OVER COMMERCE WITH THE INDIAN TRIBES TO LOCAL VOLUNTARY TRIBAL COUNCILS ALLOWING THEM TO GOVERN NON-INDIAN LANDOWNERS AND THAT THE ISSUANCE OF A PATENT TO A NON-INDIAN TERMINATES LEGISLATIVE AND REGULATORY JURISDICTION OVER THE LAND IN QUESTION VESTING SAME FULLY AND COMPLETELY IN THE STATE OF WYOMING

The Court of Appeals was concerned with "relationships here concerned". The attempted delegation of a federal regulatory function to a local tribal council authorizes and allows that local council to determine and govern citizens of the United States that have no vote therein. Criminal sanctions are applied against people not represented in the tribal government nor having any say whatsoever in the enactment of ordinances which subject them to criminal prosecution. Likewise, the non-Indian defendants herein have no recourse to the courts for any administrative grievances.[9]

[9]The Court's attention is called to the case of Dry Creek Lodge et al. v. United States, C74-74, (USDC-Wyo.) now on appeal to the Tenth Circuit Court of Appeals. The position of the Indian Tribes in that particular litigation was that the federal court had no jurisdiction over any matter involving tribal affairs. The plaintiffs in that action then pursued a remedy in the state court and met again with the argument that a state court has no jurisdiction. The plaintiffs, non-Indians, have no standing in the tribal court for their grievances to be heard and are effectively denied a forum. Within the so-called "Indian country" of the Wind River Indian Reservation, approximately 25,000 people live and reside. Only 4,000 of these people are enrolled Indians and the power of the tribal council, based upon the position as taken by the government herein, could extend to each and every one of these people without representation. This is the type of relationship that the Court of Appeals was concerned with and disapproved of.

The tribes, in a sense, are voluntary in their membership inasmuch as unless an individual is enrolled within a certain prescribed time after his birth, he is not a member of the tribe. The Court of Appeals drew an analogy to the tribe as a landowner with the powers of same to govern and function as a governmental body pertaining to the tribal lands remaining under their jurisdiction. Indeed, 18 U.S.C. 1161 specifically attempts to authorize the tribal councils to enact ordinances pertaining to these intoxicating liquor questions and excludes the penal sanctions of the statute for those areas determined not to be "Indian country." In this context, the following principle applies:

> Simple criterion is that to all lands thus described it was Indian country whenever the Indian title has not been extinguished, and it continued to be Indian country so long as the Indian had title to it no longer. As soon as they parted with the title, it ceased to be Indian county, without any further act of Congress, unless by treaty which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case. ***Clairmont v. United States,*** 225 U.S. At 556.

These lands in question are deeded lands, patent having been issued by the United States, which patent was unrestricted as to any use restrictions placed against the land. The principle of Clairmont applies in the context of alcoholic beverage regulation, simply that where Indian title has been extinguished by the issuance of a patent, jurisdiction ends. The reason for the rule is obvious, inasmuch as the issuance of a patent takes the land in question out of Indian ownership and creates the possibility that non-Indian citizens may become title to the premises. These non-Indians have no voice in the tribal government and in order for the basic protections of the constitutional rights of citizens of representation and votes within their duly elected and constituted governments in access to the courts, the jurisdiction then vested for all purposes in the

state. This application of the disestablishment theory is necessitated in order to guarantee the basic rights and principles of equal protection and due process currently not available to non-Indians within the tribal councils.10

The Wyoming Supreme Court has followed this disestablishment theory in other cases involving criminal conduct on the Indian reservation, ***State v. Moss,*** 471 P.2d 33 (Wyo. 1970); ***Blackburn v. State,*** 357 P.2d 174 (Wyo. 1960), both holding for the proposition that once patent issues, title to the Indian lands and territory extinguishes federal jurisdiction. This proposition of extinguishment of regulatory police power jurisdiction has even been extended to allottees, citizens of the United States and subject to the police powers and laws of the state wherein they reside. The extinguishment of federal authority, and the derived tribal authority is extinguished for the purpose of the regulation of intoxicating liquors by the establishment and existence of an unrestricted patent. In re: ***Heff,*** 197 U. S. 488 (1905); ***U.S. v. Twelve Bottles of Whiskey,*** D.C. Montana 201 Fed 191 (1912) ***Evans v. Victor;*** 204 Fed. 361, Rev'g. 199 Fed. 504; ***Schaap v. U. S.,*** (CCA 8 1914) 210 Fed. 853; ***Royal Brewing Company v. Missouri, K. and T. Ry. Co.,*** (DC-Kan.), 217 Fed. 146; ***Rider v. LaClair,*** 77 Wash. 488, 138, Pac. 3.

[10]The record in this case demonstrates the defects. Non-Indians are required to pay higher license fees than Indians for the issuance of tribal permits. Although public hearings are allowed, the rights to counsel and the rules and regulations for the conduct thereof have not been prescribed, no transcripts taken of the proceedings, and there is no appeals provision to any court of competent jurisdiction. A non-Indian is called in before a tribal council consisting of people that he is not entitled to cast his franchise for and who are not answerable to him by election or otherwise. This is contrasted with the protections and safeguards available to Indians and non-Indians alike under the provisions of the Wyoming Administrative Procedures Act.

CONCLUSION

From this record, it is submitted that the government failed in its burden of proof to establish that the Respondents were operating in an "Indian community"; 18 U.S.C.A. 1154 is unconstitutionally void for vagueness; that Congress has effectively ended pre-emption of its regulatory powers under the commerce clause of the Consitution and vested same within the State of Wyoming and that the Wind River Indian Tribes attempt to require a second licensing procedure is beyond the tribal powers of sovereignty as pertains to non-Indians living upon patented lands over which federal legislative jurisdiction has been extinguished. For the foregoing reasons and upon these grounds, the judgment of the Court of Appeals should be affirmed.

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